In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1040

STUART L. STEINBERG, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-6242

WILLIAM CAPO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Both petitioners contend that the government's application for an order authorizing electronic interception did not sufficiently establish that other investigative procedures were inadequate. Petitioner Steinberg also contends that the court below used the wrong standard in evaluating the government's compliance with Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were

convicted of conspiracy to distribute Schedule I, II, and III controlled substances, in violation of 21 U.S.C. 846; distribution of a Schedule III controlled substance (phencyclidine hydrochloride ("PCP")), in violation of 21 U.S.C. 841(a)(1); and use of the telephone in furtherance of the conspiracy, in violation of 21 U.S.C. 843(b).[1] Petitioner Steinberg was sentenced to 18 months' imprisonment, a $10,000 fine, and three years' special parole. Petitioner Capo was sentenced to three years' imprisonment to be followed by two years' special parole. The court of appeals affirmed in a comprehensive opinion (Pet. App. A).[2]

The facts are fully set forth in the opinion of the court of appeals. They indicate that on June 26, 1973, Special Agent Brian Noone of the Drug Enforcement Administration was introduced by an informant to petitioner Steinberg as the representative of a man who had money to invest in drugs. Steinberg gave Noone a small sample of PCP and indicated that he could provide large quantities of the drug. Noone purchased two ounces of PCP from Steinberg for $2,400 on June 27, 1973, and one-half pound for $8,000 on July 10, 1973. Petitioner Capo supplied some of the PCP involved in these transactions (Pet. App. A 2).

Between July 10 and 18, 1973, Noone had several telephone conversations with Steinberg relating to 20 and 50 pound PCP transactions, and Steinberg agreed to supply 50 pounds of the substance for $680,000. A wire interception

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[1]Indicted together with petitioners were Howard Kaye and James Parker, whose convictions were reversed by the court of appeals; John Perlman, Jeffrey Priesman, Susan Weinblatt, Stephen Effron, and Stanley Nicastro, who entered pleas of guilty; Jane Doe a/k/a "Sam," whose trial was severed from that of her co-defendants; and Michael Dorst, who died prior to trial.

[2]"Pet. App." refers to the appendix to petitioner Steinberg's petition, No. 75-1040.

was then placed on petitioner Steinberg's telephone, following which Noone called to confirm the 50-pound transaction (Pet. App. A 2 to A 3).

On July 24, 1973, Steinberg was advised by one of his suppliers that he would have to postpone the sale because the supplier's source had been arrested. Steinberg told Noone of the delay and suggested that they go ahead with a cocaine transaction which they had been discussing. When Steinberg found that the cocaine he had intended to sell Noone was of inferior quality, he unsuccessfully attempted to obtain 50 pounds of the drug from another source. During the following week, petitioner tried without success to sell Noone large quantities of seconals, tuinals, hashish and marijuana (Pet. App. A 3).

1. Petitioners contend that the government's application for a wire interception order did not contain the "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," required by 18 U.S.C. 2518(1)(c). We have recently discussed the requirements of Section 2518(1)(c) in our briefs in *Anderson* v. *United States,* No. 75-500, and *Green* v. *United States,* No. 75-962, petitions for writs of certiorari pending, and in *Lawson* v. *United States,* No. 75-659, certiorari denied, February 23, 1976, to which we respectfully refer the Court.[3] In brief, we there noted that the requirement of Section 2518(1)(c) is satisfied when—viewing the affidavit in a practical and commonsense fashion—a sufficient factual basis is shown from which the issuing authority can reasonably conclude that electronic surveillance is necessary to obtain evidence for the successful prosecution of persons known to be involved in the criminal activities under investigation or is necessary to

[3]We are sending petitioners copies of our briefs in these cases.

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ascertain the full scope of such criminal activities and the identity of the participants therein. See *United States* v. *Turner*, 528 F.2d 143, 152 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, December 1, 1975, No. 75-5330.[4]

In making this determination, the issuing judge must consider the type of illegal activity under investigation and the extent to which telephonic communications are involved therein. *United States* v. *Bobo*, 477 F.2d 974 (C.A. 4). Here, for example, the very nature of the crime under investigation—violation of 21 U.S.C. 843(b), which prohibits the use of the telephone in furtherance of a drug conspiracy—tended to make investigative techniques other than electronic surveillance unlikely to succeed. The issuing judge also may properly rely on the conclusions of experienced investigators in determining whether the interception is necessary (*United States* v. *Smith*, 519 F.2d 516, 518 (C.A. 9); see Pet. App. C 13), and his determination should be accorded substantial weight by the reviewing court (cf. *Jones* v. *United States*, 362 U.S. 257, 270-271).

Applying these principles to the present case, the courts below correctly found the application sufficient. Agent Noone's affidavit described the previous investigative efforts and explained why they had met with only limited success. He noted that Steinberg conducted much of his drug business over the telephone and that there was little possibility that the agents would be able to identify his

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[4]Section 2518(1)(c) "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Kahn*, 415 U.S. 143, 153, n. 12. It does not require the government actually to try normal investigative techniques unless there is a reasonable likelihood that, if tried, such techniques would be successful. *United States* v. *Pacheco*, 489 F.2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909; *United States* v. *Falcone*, 364 F. Supp. 877, 889 (D. N.J.), affirmed, 505 F.2d 478 (C.A. 3), certiorari denied, 420 U.S. 955.

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suppliers by means of undercover investigations (Pet. App. C 9 to C 13). In addition to describing the specific difficulties encountered in this investigation, Noone related the general experience of DEA agents that large-scale drug dealers "are particularly covert in their activities and wary of surveillance by Federal and State law enforcement personnel. Such dealers very rarely keep records, deal personally with a very few trusted individuals and isolate themselves from other individuals in the distribution organization" (Pet. App. C 13). The specific description of Noone's dealings with petitioner Steinberg showed that petitioners were typical in this regard.[5]

In sum, the affidavit here satisfied the showing required by Section 2518(1)(c) as consistently interpreted by this Court and the great majority of lower courts that have considered the issue. But petitioners contend (Steinberg Pet. 8-9; Capo Pet. 6), that there is a conflict between this case and the recent decision of the Ninth Circuit in *United States* v. *Kalustian,* No. 74-3314, decided August 4, 1975.

We note first that the language in *Kalustian* upon which petitioners rely in defining the scope of the government's duty imposed by Section 2518(1)(c) was deleted when an amended opinion was issued by the panel on December 11, 1975, presumably in response to the government's petition for rehearing and suggestion of rehearing *en banc* (see Brief

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[5]In a conversation between petitioner Steinberg and one of his suppliers, overheard by Noone, Steinberg assured the supplier that Noone would not be present when the drugs were delivered to Steinberg, since Steinberg recognized that neither party wished to meet the other. Petitioners imply (Steinberg Pet. 6; Capo Pet. 4, n. 2) that the suppliers' reluctance to meet the agent was related to the agent's own reluctance to have such a meeting. But clearly any expression of interest in such a meeting would have imperilled the agent's credibility in the eyes of the conspirators.

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for the United States in *Anderson* v. *United States*, No. 75-500, App. 9a-10a). Thus, even the *Kalustian* panel has evidently rejected the standard relied upon by petitioners as overly stringent. Nevertheless, in finding the particular affidavit in issue there insufficient, the *Kalustian* panel still appears to be inconsistent with the interpretation of Section 2518(1)(c) adopted by this Court and the courts of appeals in other circuits. It is thus possible that a conflict is emerging on this issue between the Ninth Circuit and other courts of appeals that have considered the question, although at present the precise extent of the Ninth Circuit's departure from the standards applied by other circuits is not clear. Should a substantial conflict clearly develop that seems likely to affect a significant number of cases, we believe the issue would probably be of sufficient importance to justify resolution by this Court. At the present time, however, there appears to remain some internal inconsistency within the Ninth Circuit regarding the issue, and there are pending requests for *en banc* consideration by that court that, if granted, might eliminate the necessity for further review by this Court.[6] Accordingly, we believe that the question is presently not ripe for consideration by this Court.[7]

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[6]Our rehearing requests in *Kalustian* were denied March 25, 1976. A result similar to *Kalustian* was recently reached by a panel of the Ninth Circuit in an unpublished order in *United States* v. *Gross*, No. 75-2376, decided February 19, 1976, petition for rehearing with suggestion of rehearing *en banc* pending; and in *United States* v. *Pezzino*, No. 75-2305, decided January 23, 1976, petition for rehearing with suggestion of rehearing *en banc* pending, the panel applied *Kalustian* in finding that the affidavit in that case did satisfy the requirements of Section 2518(1)(c). Other panels of the Ninth Circuit have not imposed requirements as stringent as those used in *Kalustian*. See *United States* v. *Smith*, *supra*; *United States* v. *Turner*, *supra*. There are at least three other cases presently pending before the Ninth Circuit involving the same issues. *United States* v. *Pulliam*, No. 75-1383; *United States* v. *Zarowitz*, No. 76-1026; *United States* v. *Masterana*, No. 76-1027.

[7]Nor is it by any means clear that, in the particular circumstances of this case, the Ninth Circuit would reach a contrary result if it applied *Kalustian*.

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2. In a related contention, petitioner Steinberg maintains (Pet. 12-15) that the court of appeals tested the government's compliance with Title III by an inadequate standard. He points to the court's conclusion (Pet. App. A 6) that "the Government has substantially complied with the statutory mandate" in its showing that normal investigative techniques would be inadequate. In context, we submit that this language does not indicate that the court was imposing any standard less than strict compliance with the statute.[8] A number of other courts have used the same language in holding that Title III requirements are met. See, *e.g., United States* v. *Tortorello,* 342 F. Supp. 1029, 1036 (S.D. N.Y.), affirmed, 480 F.2d 764 (C.A. 2), certiorari denied, 414 U.S. 866; *United States* v. *Falcone,* 364 F. Supp. 877, 889-890 (D. N.J.), affirmed, 505 F.2d 478 (C.A. 3), certiorari denied, 420 U.S. 955; *United States* v. *King,* 335 F. Supp. 523, 535 (S.D. Cal.), modified, 478 F.2d 494 (C.A. 9), certiorari denied, 417 U.S. 920; *United States* v. *Escandar,* 319 F. Supp. 295 (S.D. Fla.), reversed on the grounds *sub nom. United States* v. *Robinson,* 468 F.2d 189 (C.A. 5), on rehearing *en banc,* 472 F.2d 973.

The language used by the court below simply reflects the fact that in determining whether the government has adequately shown that other investigative techniques are unlikely to succeed or will be too dangerous, the court is dealing with questions of degree and should review the adequacy of the prior investigative efforts of the government in a practical and commonsense fashion. *United States* v. *James,* 494 F.2d 1007, 1015 (C.A. D.C.), certiorari

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[8]Indeed, the sentence concludes "and we note that on oral argument appellants could advance no logical alternative to wiretapping to ascertain the details of Steinberg's operation" (Pet. App. A 6). Petitioners have not suggested any such realistic alternatives in this Court.

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denied *sub nom. Jackson* v. *United States,* 419 U.S. 1020; see also S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1964).

In any event, as noted above, regardless of the language used by the court below, its interpretation of Section 2518(1)(c) is entirely consistent with that of the great majority of courts that have considered the issue.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.